(9) (5) (4) (2)

Nos. 99-1257, 99-1263, 99-1265 and 99-1426

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
MAR 14 2000
CLERK

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

AMERICAN LUNG ASSOCIATION,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

(*Case Captions Continued on Inside Cover*)

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* MERCATUS CENTER AT GEORGE MASON UNIVERSITY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI AND IN SUPPORT OF THE CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

ERNEST GELLHORN
Counsel of Record
ANN G. WEYMOUTH
Suite 100
2907 Normanstone Lane, N.W.
Washington, D.C. 20008-2725
(202) 319-7104

March 14, 2000

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

22pp

MASSACHUSETTS AND NEW JERSEY,
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BRIEF OF *AMICUS CURIAE* MERCATUS CENTER AT GEORGE MASON UNIVERSITY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI AND IN SUPPORT OF THE CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Mercatus Center at George Mason University is a nonprofit research and educational institution, as defined by the Code of the Internal Revenue Service, 26 U.S.C. § 501(c)(3), whose Regulatory Studies Program ("RSP") is dedicated to advancing knowledge of administrative regulations and their impact on society.* RSP submitted comments to the Environmental Protection Agency on the proposed national ambient air quality standards for ozone and particulate matter that are the subject of the Petitions herein. Its comments focused on the inadequacy of the scientific foundation of the proposed standards and on the disproportionate risks they would impose on the general population, both because ozone provides direct health benefits that should be considered, and because the extraordinary cost of achieving the standards would adversely affect public health.

The consent of the parties to the filing of this *amicus curiae* brief has been obtained and is filed with the Clerk of the Court.

ARGUMENT

I. INTRODUCTION AND BACKGROUND

The central issue in the petitions for a writ of certiorari filed separately by the Environmental Protection Agency

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*** Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no persons other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.**

("EPA"), the American Lung Association ("ALA"), and Massachusetts and New Jersey ("States") is whether the court of appeals properly interpreted the nondelegation doctrine when it reversed and remanded the National Ambient Air Quality Standards ("NAAQS") for ozone and particulate matter because EPA's interpretation of Section 109 of the Clean Air Act ("CAA") stated no "intelligible principle" on which the levels were based.

Petitioners rely primarily on three contentions to justify review. First, they argue that as a matter of public policy, the ozone and particulate matter rules are fundamentally sound and of "immense practical importance to the health of the American public." EPA Pet. 9; see State Pet. 26-28; ALA Pet. 15-17. Second, they assert that the lower "court's decision represents a radical departure from settled law respecting the nondelegation doctrine." EPA Pet. 9; see *id.* 11-19. Third, they charge that the lower court's ruling would improperly "expand the role of courts in reviewing agency action." *Id.* 9.[1]

None of Petitioners' arguments is meritorious. First, the EPA rules will not improve public health. They are

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[1] We do not address the issue raised by EPA but not by other petitioners, namely, whether EPA had taken final action and, thus, whether the Subpart 2 implementation issues were ripe for review. EPA Pet. 19-21. Contrary to the EPA petition, we believe it is clear beyond reasonable argument that the EPA's action here—"two *final* EPA rules establishing revised National Ambient Air Quality Standards (NAAQS) for particulate matter and ozone," EPA Pet. 2 (emphasis added)—"alters the legal regime to which the action agency is subject." *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (biological opinion isued by Fish & Wildlife Service under Endangered Species Act constitutes final agency action). The EPA rulemaking "implicate[s] the viability of massive regulatory programs which rely upon both the validity and enforceability of the revised ozone and PM NAAQS." State Pet. 26. The EPA petitioners dispute the application of the finality/ripeness tests but identify no conflict among the circuits on this issue or confusion in the criteria to be applied.

based on highly uncertain evidence and ignore important countervailing health considerations.

Second, the lower court did not misunderstand the nondelegation doctrine. It applied the doctrine in a traditional and reasonable fashion, focusing on the absence of any intelligible standard in the agency's interpretation of the CAA and identifying how the agency might construe the statute to save it from being found invalid.

Third, the appeals court did not apply the nondelegation doctrine to reverse a Congressional delegation to the EPA, nor did it, itself, reinterpret the statute to conform to its views of the constitutional norm. Instead, it took a far less intrusive approach, consistent with this Court's decision in *Chevron*, of remanding the matter to the agency for EPA to interpret the CAA consistent with the "intelligible principles" requirement of the nondelegation doctrine.

Under the Clean Air Act, EPA is to set NAAQS at levels "requisite to protect the public health" with an "adequate margin of safety." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). In the case of ozone and particulate matter ("PM"), EPA's evidence suggests that there is no threshold below which either pollutant would not pose health threats. However, EPA failed to identify specific standards or measurable factors consistent with the CAA as the basis for the NAAQS levels it selected. It interpreted the CAA as allowing it to choose any point along a "linear nonthreshold" [2] continuum and to claim that the

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[2] The linear, nonthreshold dose-response model that EPA uses in its analysis relates the predicted change in health effects to a change in the concentration of PM or ozone. Unlike other chemicals regulated by EPA under this section of the CAA, EPA has no scientific evidence of a threshold concentration below which PM or ozone will not have health effects. This is the nonthreshold aspect of the model. The linear aspect of the model assumes that regard-

selected point provides an adequate margin of safety—without regard to whether that margin could be satisfied at a less stringent level.

Because the linear nonthreshold model attributes health benefits to each further reduction in ozone and PM, no matter how clean the air already may be, and without regard to the overall effect on public health, EPA's interpretation of the CAA would allow it to set the level for each at zero. It relies upon "policy judgments" to justify its selected standards. Thus, any level chosen by EPA—"any point between zero and a hair below the concentrations yielding London's Killer Fog," Pet. App. 13a—is automatically permissible under the agency's reading of the CAA because, according to EPA, the statute imposes no limits on its policy judgment.

The basic fault in EPA's misguided interpretation of the CAA, and thus of its NAAQS rules, derives from the D.C. Circuit's decision in *Lead Indus. Assn. v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), holding that § 109 of the CAA prohibits the consideration of "any factor other than 'health effects relating to pollutants in the air' " in setting NAAQS levels. *See* Pet. App. 15a. This reading of the CAA is not supported by the text, structure, context or legislative history of the Act, see ATA Cross-Pet. 14-15, or by rational policy analysis. Protecting public health necessarily involves consideration of a broad range of factors, including trade-offs between different health effects and the costs of implementing a standard, because large costs themselves can have negative public health consequences.

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less of the overall concentration of ozone or PM to which an individual is exposed, a one unit change in that concentration will have the same marginal effect.

II. EPA'S OZONE AND $PM_{2.5}$ RULES ARE LIKELY TO HARM PUBLIC HEALTH BECAUSE THEY IGNORE TRADE-OFFS AND OTHER HEALTH EFFECTS

EPA's revised NAAQS would reduce the allowed level of ground-level ozone by about 10 percent and regulate very fine particles ($PM_{2.5}$) for the first time. It argued that these revisions were necessary to protect the public from respiratory health effects, especially asthma. Contrary to EPA's assertions that these rules would make a significant contribution to public health, the standards have little scientific merit, were not endorsed by EPA's own scientific advisors, and were based on unduly narrow health considerations. EPA has presented no evidence that the new standards are achievable, and even if they were, EPA cannot demonstrate that they are likely to be more protective of public health than current NAAQS levels. In fact, the opposite is true.

For the ozone standard, EPA's Clean Air Scientific Advisory Committee ("CASAC"), a legislatively-established body of independent experts which provides advice to EPA on scientific and engineering issues, concluded that "there is no 'bright line' which distinguishes any of the proposed standards (either the level or the number of allowable exceedances) as being significantly more protective of public health." CASAC Letter to Carol Browner *re: Ozone* (November 30, 1995) Ozone JA 238. Moreover, the majority of members on the panel who expressed an opinion preferred a level less stringent than that proposed by EPA. *Id.*

Similarly for the PM standard, CASAC could find no consensus for selecting "the level, averaging time, or form of a $PM_{2.5}$ NAAQS." CASAC Letter to Carol Browner *re: Particulate Matter* (June 13, 1996) PM JA 3162. Only 2 of the 21 scientists on CASAC were willing to

endorse a general range as stringent as the range adopted in EPA's $PM_{2.5}$ standard. *Id.* 3165.

EPA ignored other important information relevant to public health in setting the ozone and PM levels. For example, it acknowledged that, due to ozone's screening effect on harmful ultraviolet-B radiation, the reduction in ozone levels mandated by the NAAQS will increase malignant and nonmelanoma skin cancers and cataracts. EPA, *Calculations of the Impact of Tropospheric Ozone Changes on UV-B Flux and Potential Skin Cancers* (Draft) (September 1994) (Cupitt, Larry T.) Ozone JA 3089-3104. Nonetheless, EPA ignored these data in setting the ozone standard. In uncontradicted evidence submitted to EPA, the Department of Energy projected that a 10 ppb reduction in ozone concentrations, as required by the ozone rule herein, would result in 25 to 50 new melanoma-caused fatalaties, 130-260 incidences of cutaneous melanoma, 2,000-11,000 new cases of nonmelanoma skin cancer, and 13,000 to 28,000 incidences of cataracts each year. Statement of Marvin Frazier, DOE Office of Health & Environmental Research, Before CASAC (March 21, 1995) Ozone JA 258-59. These negative health effects of the ozone standard dwarf EPA's projected positive health effects, which do not include any reduction in deaths. *See* Susan E. Dudley & Wendy L. Gramm, *EPA's Proposed Ozone Standard May Harm Public Health and Welfare,* 17 Int'l J. of Risk Analysis 403 (August 1997).

EPA itself concedes that the costs of the new ozone regulation will far exceed its benefits, but asserts that under *Lead Industries* the agency may not consider implementation costs when setting NAAQS. *EPA Ozone Rule,* 62 Fed. Reg. 38,855, 38878 (July 18, 1997); *Regulatory Impact Analysis,* Ozone JA 2924, 2934 (July 16, 1997). Yet mounting research shows that regulatory costs do affect public health because such costs represent fore-

gone opportunities to improve health and safety—e.g., disease prevention, better diets and improved sewage treatment. *See, e.g.*, Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 23 (1993) ("deprivation of real income itself has adverse health effects, in the form of poorer diet, [and] more heart attacks"). Studies linking income and mortality find that every $15 million decline in incomes results in one statistical death. Randall Lutter, John F. Morrall, III, W. Kip Viscusi, *The Cost-Per-Life-Saved Cutoff for Safety-Enhancing Regulations*, 37 Economic Inquiry 599 (October 1999). Applying this analytical framework to the ozone and PM rules herein, the Mercatus Center's Regulatory Studies Program estimates that full compliance could exceed $100 billion per year and increase mortality by over 6,500 deaths per year (not including the increase in melanoma deaths from UV-B exposure). *See RSP Comments in EPA Ozone/PM Rulemaking* (submitted March 12, 1997) (available at www.gmu.edu/mercatus/).

This disregard for the "wealth-health" effect is a direct result of the D.C. Circuit decision in *Lead Industries* barring consideration of costs because the CAA "makes no mention of such factors." 647 F.2d at 1149 n.37. Both EPA and the lower court interpreted *Lead Industries* as limiting the NAAQS rulemaking to direct health effects and as not permitting consideration of the costs and their relationship to benefits imposed by the rule and of whether the costs imposed by the rule will result in a net reduction in human health or a net increase in lives lost. ATA Cross Pet. 6. However, as the ATA Cross Petition shows, the ruling in *Lead Industries* is based on an erroneous reading of the CAA, has been extended improperly beyond its basis, is contrary to the principles and rationale of this Court's ruling in *Benzene* (discussed *infra* pp. 13-14), and should be reconsidered as urged by Respondents below. ATA Cross Pet. 14-18.

III. REQUIRING EPA TO IDENTIFY "INTELLIGIBLE PRINCIPLES" DERIVED FROM THE CLEAN AIR ACT IS CONSISTENT WITH ESTABLISHED PRECEDENTS

This case does not require application of the nondelegation doctrine to overturn the CAA or otherwise to interfere with broad legislative delegations of administrative authority. It also does not require that the doctrine be revised before being applied as a prophylactic canon of construction. Finally, the Court need not consider whether the CAA's defining terms—that the NAAQS standards must "protect the public health" with an "adequate margin of safety," CAA § 109(b)(1)—are unconstitutionally unconfined and therefore should be overturned.

Rather, the issue here is a narrow one. The court below limited its ruling and held only that it is the agency's responsibility to interpret the statute, if possible, in a manner that is consistent with the principles of the nondelegation rule. What the court said is that EPA is *not* free to read the CAA terms as setting virtually no definable limits on the agency's authority when setting NAAQS for ozone and PM, while ignoring a more specific construction that could provide a principled basis for the agency's rules.

We believe that the analysis applied by the court below is correct and consistent with numerous cases decided since 1935 and 1936 when the doctrine was last applied by this Court to directly invalidate a Congressional enactment. Administrative agencies are obliged to interpret their authority to avoid unchanneled delegations of discretion to the agency. To rule otherwise is to raise the specter of "delegation[s] running riot," *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring), and to disregard the first operative sentence of the Constitution that "[a]ll legislative

Powers herein granted shall be vested in a Congress of the United States." U.S. Constitution, Art. I, § 1; *see also id.* Art. I, § 8.

A. Under the Nondelegation Doctrine, Congressional Legislation Must Be Interpreted, If Possible, as Providing Guidance for Measuring the Limits and Lawfulness of Agency Action

The core requirement of the nondelegation doctrine is undisputed by Petitioners. EPA Pet. 13. It establishes that legislative authority delegated by Congress to the executive must state "intelligible principles," *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904), by which the agency is given a "primary standard" to guide its action. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928); *see Clinton v. City of New York*, 524 U.S. 417, 484-96 (1998) (Breyer, J., dissenting). It is satisfied where "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

That the nondelegation doctrine is rarely applied to invalidate legislation does not mean that it has been abandoned or that it is without continuing substantial influence. *See South Dakota v. United States Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995) (invalidating Indian Reorganization Act authorizing Interior Secretary to acquire lands in trust for tribes because Act provided no "intelligible principles" for determining when that authority could be exercised), *vacated & remanded on change in petitioner's position*, 519 U.S. 919, 920-23 (1996). It has an "important and continuing 'shadow' impact" on the reading and review of legislative delegations. P.

Strauss, T. Rakoff, R. Schotland & C. Farina, *Cases and Comments on Administrative Law* 92 (9th ed. 1995).

For example, in *Touby v. United States,* 500 U.S. 160 (1991), the Attorney General's broad discretion to temporarily add or remove psychoactive drugs from the "schedules" of prohibited or regulated controlled substances was upheld. In upholding this authority, however, the Court relied heavily on two concessions by the Government which more narrowly confined the Attorney General's discretion. First, it acknowledged that a drug could not be added to Schedule I (the most harmful category) without first being subject to additional testing. Second, the provision freeing temporary scheduling orders from judicial review did not preclude a defendant facing criminal charges from asserting a challenge to the temporary scheduling order as a defense to the prosecution. *See id.* 170 (Marshall, J., concurring).

Thus, the nondelegation doctrine does not mean that Congress cannot delegate broadly or allow executive agencies substantial discretion. And there are numerous examples, which Petitioners trumpet, EPA Pet. 12 n.5, of facially open-ended statutory "standards" that delegate to an agency the power to determine what are "excessive profits," "fair and equitable" prices, "just and reasonable rates," and "unfair methods of competition" which have been upheld. But in every case, the Court has identified specific limits or compelling constitutional reasons justifying the delegation before upholding the statute or rule.

What Petitioners fail to recognize is that these open-ended statutory standards have been upheld only after finding an exceptional circumstance (e.g., relying on the President's extensive war powers or authority to conduct foreign affairs) justifying the delegation or because the executive discretion was bounded by precedent, recognized principles implicit in the statute, or other similar restric-

tions. For example, *Yakus v. United States*, 321 U.S. 414 (1944) and *Lichter v. United States*, 334 U.S. 742 (1948) are emergency wartime measures where "broad discretion . . . may be essential." *Id.* 779. *Fahey v. Mallonee*, 332 U.S. 245, 249-53 (1947) upheld broad powers to oversee banking because a long history of such regulation had established specific common law standards which guided the regulators. And *Amalgamated Meat Cutters & Butcher Workmen of N.A. v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (Leventhal, J.) upheld non-wartime wage and price controls only after finding that the administrative authority was confined by price control precedents and after incorporating other restrictions including APA procedures and opportunities for judicial review in the regulatory program.

There also are even more cases where administrative action was upheld only after the Court "reinterpreted" the statute to find an implied condition limiting the facial agency authority. *E.g., Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607 (1980) (*Benzene*); *National Cable Television Assn. v. United States*, 415 U.S. 336, 342-43 (1974) (narrowing basis for FCC to set cable television fees); *Zemel v. Rusk*, 381 U.S. 1 (1965) (reading areas of restrictions on passports as limited by "prior administrative practice"); *Kent v. Dulles*, 357 U.S. 116 (1958) (reading passport authority narrowly to deny Secretary of State power to refuse a passport on grounds of political belief). The typical application of the nondelegation doctrine, in fact, is by "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta v. United States, supra* at 374 n.7; *see also Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 222-23 (1989).

B. The Clean Air Act Could Satisfy the Nondelegation Doctrine If It Were Interpreted as Implying Limits on EPA's Authority to Set NAAQS Levels

The lower court here similarly found EPA's interpretation of the CAA inadequate because the agency had failed to find any limit on its authority to select the levels at which the ozone and PM standards were to be set. The D.C. Circuit held that § 109 and related sections of the Act must be construed to provide an "intelligible principle" that guides the exercise of agency discretion. Finding that EPA had failed to define such a standard in the CAA, the court remanded the rules for "EPA to develop a construction of the act that satisfies this constitutional requirement." Pet. App. 4a.

The Government's Petition now claims to have found a standard in EPA's interpretation of the CAA because the Act "requires EPA to develop the [limiting substantive] 'criteria' " in accordance with established rulemaking and judicial review procedures in § 307(d), 42 U.S.C. § 7607(d), and as derived from the Act's legislative history which references "adverse effects." EPA Pet. 13-15 & n.8. However, this description of EPA's approach has no support in the record and is inconsistent with EPA's position below. This contrived effort to seek shelter under the *Benzene* ruling fails because the term "adverse" tells us nothing about the degree of harm which must be found. To say that something must be "unfavorable" or "harmful" [3] does not tell us how harmful, or that the harm must be substantial or significant. In any case, EPA's rule cannot be upheld on a view not adopted by EPA but advanced for the first time by counsel before this Court. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appel-

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[3] *Webster's New World Dictionary* 21 (College Edition 1964) (defining "adverse" as something "unfavorable, harmful").

late counsel's post hoc rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated by the agency itself.").

The situation here is closely analogous to *Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607 (1980) (plurality opinion) (*Benzene*), where this Court reversed an OSHA rule issued by the Secretary of Labor that would have imposed stringent measures to minimize worker exposure to benzene, a cancer-causing chemical. According to the Court plurality, the rule could not be justified by the statutory terms requiring employers to protect their workers "to the extent feasible" from harm due to toxic substances because feasibility was not, at least on its face, a sufficiently limiting requirement. However, after reviewing the organic act, its terms and context, the plurality determined that the "feasibility" requirement was adequate because it required the Secretary to make a finding that the preexisting situation created a "significant risk" (which the OSHA rule could then alleviate). With that addition, the impermissibly standardless facial authority was held to satisfy the nondelegation doctrine. That is, the plurality narrowed the feasibility standard in the statute by interpreting it as including a significant risk test. It then remanded the matter to the agency for reconsideration of the rule under the revised interpretation of its statutory authority.[4] As here,

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[4] The *Benzene* plurality became a majority with the vote of then-Justice Rehnquist who would have invalidated the statute as an impermissible delegation. He found the statute's "to the extent feasible" standard a "mirage" and unconstitutional because Congress had delegated to the Secretary the "fundamental" policy decision of "where on the continuum of relative safety [the Secretary] should draw his line." 448 U.S. at 675, 681, 687-88. Under its interpretation of § 109 of the CAA, EPA claims the same discretion here.

however, the facially open-ended grant of authority to the agency was not upheld and the agency was afforded the opportunity to apply the corrected standard in developing its rule.

The lower court similarly remanded the rule to the agency for revision in accordance with a standard consistent with the nondelegation doctrine. However, it took a less intrusive path than that outlined in *Benzene*. It found only that, as applied, EPA's interpretation of CAA § 109 allows it untrammeled discretion that would, if not corrected, violate the nondelegation doctrine. But the court did not interpret the statute itself or tell the agency what the criteria must be under its terms. It merely held that, as interpreted by EPA, § 109 sets no limit on the agency's authority, and that under this view any level identified in the NAAQS would satisfy the CAA. Under the *Benzene* precedent, the reviewing court could have examined the statute for itself, determined its meaning (at least if it found that the intent of Congress was clear, see pp. 14-16 *infra*), and directed the agency to revise the rule in accordance with this interpretation (i.e., in a way that properly applied the reinterpreted "protect public health" with an "adequate margin of safety" test). Instead, the court below took the more limited step of remanding the matter to EPA with the direction that the agency reinterpret § 109 consistent with the nondelegation doctrine (if possible) and that under this revised understanding it identify a more specific foundation for setting the ozone and PM NAAQS.

C. Requiring the EPA to Identify the Ranking Criteria for Determining the Level of Nonthreshold Pollutants Is Consistent with *Chevron*

The ruling below that EPA, rather than the reviewing court, should determine the meaning of § 109 consistent

with the nondelegation doctrine, is also required by recognized standards for judicial review of agency action. Under *Chevron v. NRDC*, 467 U.S. 837, 842-44 (1984), courts are to defer to reasonable agency interpretations of statutes that do not clearly reveal Congress' intent on the precise issue in question. Just as EPA was allowed in *Chevron* to determine whether Congress meant EPA's regulation of "stationary sources" of pollution to be measured solely by each individual source or on a plant-wide basis, here it is for EPA to interpret the meaning of § 109 and to identify criteria consistent with Congress' intent.

The identification of the numerical equivalent or degree of an "adequate margin of safety" for nonthreshold pollutants is essentially a legislative task consistent with EPA's authority to issue legislative rules such as NAAQS standards. Thus, it is particularly appropriate that the agency be directed to fill in the meaning of this statutory standard through legislative rulemaking. *See Hoctor v. USDA*, 82 F.3d 165 (7th Cir. 1996) (Posner, C.J.) (numerical requirements are inherently "arbitrary" and involve legislative judgments which agencies are better positioned than courts to make). EPA's interpretation shall be upheld if reasonable, including therein that as interpreted the statute satisfies the nondelegation doctrine.

Enforcement of the nondelegation doctrine, to require that the NAAQS levels be consistent with Congress' stated purpose of protecting the public health with an adequate margin of safety, is consistent with sound policy. Not only are agencies quasi-legislative bodies and accountable to the people through the President's authority over them, but also EPA is the body best positioned to determine what Congress intended when it approved the provisions of § 109. 467 U.S. at 865-66. In addition, under *Chevron*, the agency interpretation is not "carved in stone" and can be modified as necessary to meet changing circum-

stances. It has greater flexibility and can move more quickly to revise the interpretation of the underlying criteria when change is required. And as long as that change is plausible and justified by reasons for the change, it will not be disturbed on judicial review. *Id.* at 863-64.

IV. REVIEW OF LEGISLATIVE RULES UNDER THE "ARBITRARY AND CAPRICIOUS" TEST OF THE APA IS NO SUBSTITUTE FOR THE NONDELEGATION DOCTRINE

Finally, review of agency action under the "arbitrary and capricious" test under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), is no substitute for application of the nondelegation doctrine to control standardless discretion. The nondelegation doctrine, as applied by the court of appeals, requires that EPA determine Congress' intent when it prescribes NAAQS to protect the public health with an adequate margin of safety. As long as EPA's interpretation of the Congressional intent confines administrative discretion within understandable bounds, it will not be disturbed by the nondelegation doctrine on review. And as long as that interpretation by EPA is reasonable—i.e., a permissible and reasonable interpretation of § 109—it will be upheld under *Chevron*.

On the other hand, application of the arbitrary and capricious test under § 706(2)(A) of the APA requires that the particular NAAQS levels selected by EPA must reflect a reasoned decision. That is, the facts must be supported by sufficient evidence before the agency, and the inferences drawn from them as well as the policy rationale and ultimate conclusions must be adequately explained and justified. *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

The nondelegation doctrine looks to the interpretation given the Congressional statute and asks whether the authorized administrative action is confined by intelligible standards. By contrast, the arbitrary and capricious test does not look at the statutory authority and its definiteness. Rather, it examines the administrative action itself and asks whether the rule is the product of reasoned decision making. Thus, the two requirements complement each other; but one is not a substitute for the other.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied and, alternatively, the cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

ERNEST GELLHORN
Counsel of Record
ANN G. WEYMOUTH
Suite 100
2907 Normanstone Lane, N.W.
Washington, D.C. 20008-2725
(202) 319-7104

March 14, 2000

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